

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JERRIE VANDER HOUWEN,

Plaintiff,

v.

UNITED STATES OF AMERICA,
et al.,

Defendants.

NO. CV-09-3019-LRS

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT,
INTER ALIA**

BEFORE THE COURT is the State Defendants' Motion For Summary Judgment (Ct. Rec. 7).

As best as the court can tell, this is a malicious prosecution action arising out of the Plaintiff's prosecution in Yakima County District Court for 10 counts of waste of wildlife, and 10 counts of killing game out of season. A jury acquitted Plaintiff of all 10 counts of waste of wildlife, and eight counts of killing game out of season. The jury convicted Plaintiff of two counts of killing game out of season, but those two convictions were reversed on appeal by the Washington State Supreme Court, *State v. Vander Houwen*, 163 Wn.2d 25, 177 P.3d 93 (2008).

The State of Washington, and its agencies named as Defendants in this action ("Department of Game" and Attorney General's Office), are immune from suit in federal court by virtue of the 11th Amendment to the United States Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct.

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1 1114 (1996). Furthermore, to the extent the Plaintiff is alleging a violation of his
2 federal constitutional rights, the State and its agencies are not “persons” subject to
3 suit pursuant to 42 U.S.C. Section 1983. *Will v. Michigan Dept. of State Police*,
4 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). To the extent Plaintiff alleges a state
5 (common) law claim of malicious prosecution against the State and its agencies,
6 that claim cannot be brought in federal court because of the 11th Amendment.
7 Furthermore, Plaintiff cannot pursue that claim **in a state court** until Plaintiff first
8 presents an administrative tort claim to the State pursuant to RCW 4.92.110 (no
9 action commenced against state, or against state officer or employee acting in an
10 official capacity, for damages arising out of tortious conduct until sixty days have
11 elapsed after the claim is presented to and filed with the State’s risk management
12 division).

13 Accordingly, the State Defendants’ Motion For Summary Judgment (Ct.
14 Rec. 7) is **GRANTED** and they are **DISMISSED** from this action. 42 U.S.C.
15 Section 1983 claims against the State Defendants are **DISMISSED with**
16 **prejudice** because, pursuant to *Will*, those claims also cannot be pursued against
17 the State Defendants in state court. State law tort claims against the State
18 Defendants are **DISMISSED without prejudice** because those claims can be
19 pursued in state court, subject to compliance with the tort claim procedure
20 specified in RCW 4.92.110.

21 Also named as Defendants in this action are “Yakima County Judicial
22 Employees/Prosecutors” and “Officials And Employees Of Yakima County.”
23 Plaintiff is advised that in order to sue Yakima County for malicious prosecution
24 under 42 U.S.C. Section 1983, it is necessary for him to allege and prove that any
25 constitutional violation was the result of a policy or custom adopted by the
26 County. *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). Moreover,
27 Plaintiff is advised that Yakima County judicial employees and prosecutors may
28 be entitled to absolute judicial immunity or prosecutorial immunity for malicious

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1 prosecution claims against them brought under federal (42 U.S.C. Section 1983) or
2 state law. It is also noted that state law tort claims brought against the County and
3 its officers and employees in their official capacities must first be presented to the
4 County by way of an administrative tort claim. RCW 4.96.020(4). No judicial
5 action on a state tort law claim may be commenced against a County and its
6 officers and employees until sixty days after the claim has first been presented and
7 filed with the County.

8 Plaintiff also names the United States as a Defendant, but it is not apparent
9 on what basis since the United States was not involved in the prosecution of the
10 Plaintiff. To the extent Plaintiff is asserting any tort claim against the United
11 States, Plaintiff must comply with the administrative tort claim procedure
12 specified in 28 U.S.C. § 2671 et seq. before he can seek judicial relief.

13 No later than thirty (30) days from the date of this order, the Plaintiff shall
14 file with the court a First Amended Complaint (designated as a “First Amended
15 Complaint”) which complies with Fed. R. Civ. P. 8(a) in setting forth a short and
16 plain statement of the grounds for the court’s jurisdiction; a short and plain
17 statement of the claim showing that the Plaintiff is entitled to relief; and a demand
18 for the relief sought. Specifically, Plaintiff shall: 1) state the basis for any claim
19 against the United States and if it is a tort claim, indicate that he has complied with
20 the federal administrative tort claim procedure; 2) state the basis for his claims
21 against Yakima County and individual county officers and employees, specifically
22 identifying the officers and employees by name, and to the extent tort claims are
23 asserted against these defendants, indicate that Plaintiff has complied with the
24 administrative tort claim procedure specified in RCW 4.96.020(4). A copy of
25 Plaintiff’s “First Amended Complaint” shall be served upon counsel for the United
26 States and counsel for Yakima County Defendants who have filed notices of
27 appearance. The court will then review the “First Amended Complaint” for
28 sufficiency and determine whether a further response from the remaining

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1 Defendants is necessary.

2 **FAILURE TO SERVE AND FILE A “FIRST AMENDED**
3 **COMPLAINT” WITHIN THE TIME SPECIFIED WILL RESULT IN**
4 **DISMISSAL OF THIS ACTION.**

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter
6 this order and to provide copies to Plaintiff, and to counsel for Defendants.

7 **DATED** this 8th day of May, 2009.

8 *s/Lonny R. Suko*

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10 LONNY R. SUKO
11 United States District Judge
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